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Supreme Court of the United States

OCTOBER TERM 1946

No. 1302

IN THE MATTER OF THE PETITION

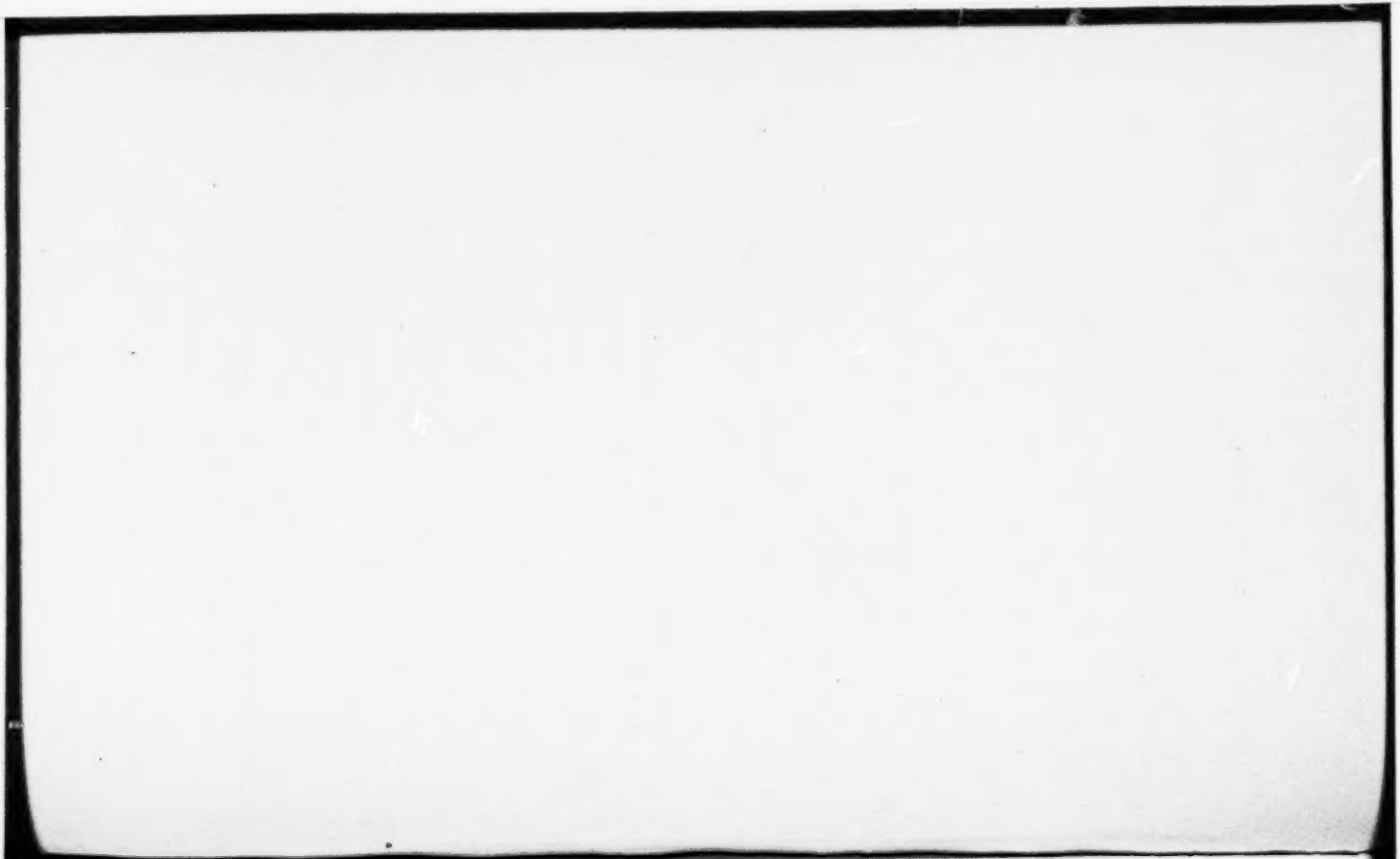
OF

The Republic of the United States of Brazil, trading under the name and style of Lloyd Brasileiro, as owner of the S.S. PEDRO, for exoneration.

SHIPOWNER'S PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

FRANK J. MCCONNELL,
Proctor for Petitioner,
The Republic of the
United States of Brazil.

FRANK J. MCCONNELL,
JAMES D. BROWN,
of Counsel.



INDEX

PAGE

SHIPOWNER'S PETITION FOR CERTIORARI 1

Jurisdiction 1
Statement 2
Statute Involved 4
The Opinions Below 4
Questions Presented 5
Reasons Relied on for an Allowance of the Writ 5

BRIEF FOR PETITIONER-SHIPOWNER 9

POINT I—The cargo fire was not "caused" by the neglect of Borges 9

POINT II—The Fire Statute is paramount. It should not be abrogated by *The Vallescura* doctrine 12

POINT III—The other issues not passed upon by the Circuit Court of Appeals 16

CONCLUSION 17

TABLE OF CASES CITED

Cabo Hatteras, The, 1933 American Maritime Cases 1587 14

Consumers Import Co., Inc., et al. v. Kabushiki Kaisha Kawasaki Zosenjo, et al. (The Venice Maru), 133 F. (2d) 781, 320 U. S. 249 ..... 13, 14

Earl & Stoddardt v. Ellermans Wilson Line (The Galileo), 54 F. (2d) 913, 287 U. S. 420 ..... 4, 9, 13, 14

PAGE

Hoskyn & Co., Inc., et al. v. Silver Line Limited (The Silvercypress), 1943 American Maritime Cases 224, 143 F. (2d) 462, cert. denied 323 U. S. 767 14

Langnes v. Green (The Aloha), 1931 American Maritime Cases 511, 282 U. S. 531 16

Larsen v. Northland Transp. Co., 292 U. S. 20 13

Main, The, v. Williams, 152 U. S. 122 13

Niel Maersk, The, 91 F. (2d) 932, C. C. A. 2d C., cert. denied 302 U. S. 753 ..... 11, 12

Norwich & N. Y. Trans. Co. v. Wright, 80 U. S. (13 Wall.) 104 13

Older, The, 1933 American Maritime Cases 936, 65 F. (2d) 359 14

Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578 ..... 12, 13

Southern Pacific Co. v. Haglund, Admx. (The Thoroughfare), 1928 American Maritime Cases 965, 277 U. S. 304 16

Vallescura, The, 293 U. S. 296 ..... 5, 6, 10, 11, 12, 15

Walker et al. v. Western Transportation Co., 70 U. S. (3 Wall.) 150 13

STATUTES CITED

Fire Statute, R. S. 4282, 46 U. S. C. § 182 ..... 4, 10, 14, 15

Section 240(a) of the Judicial Code as amended, 28 U. S. C., Sec. 347(a) 1

Supreme Court Rule 38, par. 5(b) 1

Supreme Court of the United States

OCTOBER TERM 1946

No.

In the Matter of the Petition

of

The Republic of the United States of Brazil, trading under the name and style of Lloyd Brasileiro, as owner of the S.S. Pocone, for exoneration.

SHIPOWNER'S PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Republic of the United States of Brazil, trading under the name and style of Lloyd Brasileiro, owner of the S.S. *Pocone,* for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Jurisdiction

Jurisdiction is based on Section 240(a) of the Judicial Code as amended, 28 U. S. C., Sec. 347(a), and Supreme Court Rule 38, par. 5(b).

Statement

This litigation arose out of a cargo fire discovered on January 1, 1942, aboard the S.S. *Pocone* at Pier 18, Brooklyn, New York. Petitioner prayed for exoneration pursuant to the Fire Statute. The proceedings were tried in the United States District Court for the Eastern District of New York and that Court exonerated petitioner. On appeal to the Circuit Court of Appeals for the Second Circuit, the decision of the District Court was reversed and the petitioner was held responsible.

The S.S. *Pocone* sailed from Rio de Janeiro, Brazil, in November, 1941, bound for New York. On December 19th, shortly after leaving Recife, coal in her port cross-bunker was found to be heated. It was hosed and any fire apparently extinguished. Further combustion developed two days before the vessel arrived at New York and measures were taken to extinguish it. The ship docked at Brooklyn about noontime on December 30th and Borges, petitioner's port engineer, went on board. The master told him there had been some spontaneous combustion in the cross-bunkers for two or three days before docking, but did not say it had been serious or that it had first been discovered on December 19th, eleven days earlier. Borges went down to the bunkers with the master and the chief engineer, walked alone inside the port bunker on top of the coal and looked around. The bunker was well lighted with cluster lights. Coal passers, working around the clock, were then engaged in hosing the coal and removing it aft to clean out the bunkers for a fresh supply of coal. A haze-like vapor was rising as a result of the cold water contacting the coal. Everything, including the forward 3/8-inch steel bulkhead between the cross-bunker and the No. 3 cargo reserve bunker, looked normal. A wooden casing covering a sounding pipe against the forward steel bulkhead appeared externally intact. Borges had a hole dug

down 3 or 4 feet deep in the mass of the coal into which he put his hand and the temperature was that which his hand could stand. Everything was "wet and dirty", and Borges heard of nothing and saw nothing to suggest danger to cargo in the adjacent reserve bunker. He promptly ordered a shore gang to relieve the coal passers in shifting the coal aft and the ship's coal passers worked until the shore gang came early the next morning. They finished the job and left the ship about 5 A. M. on January 1, 1942, shortly before the cargo fire was discovered.

The ship had been discharged by stevedores in the usual way on December 30th and 31st—the shelter and 'tween decks first, and when they left the ship on December 31st, New Year's Eve, not intending to return until January 2nd, the cargo in the No. 3 reserve had not yet been reached. No cargo had been discharged from the after part of the No. 3 'tween deck directly above the No. 3 reserve, nor from the forward shelter deck above the No. 3 'tween deck.

At about 7.15 A. M. on January 1st smoke was observed coming from No. 3 weather deck hatch. The City Fire Department was promptly called and the bagged castor bean cargo in the No. 3 reserve bunker immediately forward of the port cross coal bunker was found to be on fire. Soon after the fire was discovered in the No. 3 reserve it was learned that cargo on the decks above was also on fire. It is not known when the cargo fire actually started or how long the cargo had been burning with relation to the time the coal bunker fire was discovered on December 19th.

The District Court found that the cargo in the No. 3 reserve had been smouldering and charring for a number of days *before* it was discovered (Rec. 1284); that the fire was the direct result of spontaneous combustion of the coal in the cross coal bunker; and that the master had estimated spontaneous combustion was going on in the coal cross bunker for several days prior to December 19th. The Circuit Court of Appeals affirmed the findings of the District Court as to the "cause" of the fire, noted that the

trial judge had found it was the fire and heating in the cross coal bunker which had caused the cargo fire in the reserve bunker, and that the bags had been charring and heating for a number of days before the fire was discovered.

Statute Involved

United States Fire Statute, R. S. 4282, 46 U. S. C., Sec. 182, provides:

> "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The words *"caused by the * * * neglect of such owner"* mean the negligence of the owner personally or, in the case of a corporation, the negligence of its managing officers or agents. The master of the vessel, the officers and crew, are not managing officers or agents. The burden is on the claimants to prove that "design or neglect" of petitioner's managing officers or agents *caused* the cargo fire. *The Galileo,* 54 F. (2d) 913, 287 U. S. 420.

The Opinions Below

The opinion of the United States District Court for the Eastern District of New York, dated April 10, 1946, is not officially reported, but is reported at 1946 American Maritime Cases 821. It is printed in the record at page 1238. The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 159 Fed. (2d) 661, and at 1947 American Maritime Cases 306 and it is printed in the record at page 1322.

Questions Presented

The District Court found Borges, the port engineer, without fault and exonerated petitioner for all fire damage. The Circuit Court of Appeals found him at fault and held petitioner liable for all fire damage, both for that which had occurred *before* the vessel arrived at her destination and that which occurred *afterwards.*

The questions presented, therefore, are:

FIRST: Did any neglect of the shipowner's Port Engineer *cause* the cargo fire?

SECOND: The claimants have the burden under the Fire Statute of showing that the cargo fire at sea was *caused* by the neglect of the shipowner. Assuming, therefore, *after* the vessel arrived, that the port engineer's neglect contributed to further cargo damage: Upon whom was the burden of distinguishing damage occurring *before* the vessel arrived, and for which the shipowner was not responsible, from that damage which occurred *afterwards?*

Reasons Relied On for an Allowance of the Writ

1. The instant case presents for the first time to this Court a question requiring judicial interpretation of the federal Fire Statute. It is of great importance to all carriers of goods by sea.

2. The Circuit Court of Appeals, by applying to the instant case this Court's decision in *The Vallescura,* 293 U. S. 296, has lessened the value of the Fire Statute to shipowners. The Fire Statute was not before this Court in that case.

3. Since the claimants have the burden of showing that the shipowner by its neglect caused the fire, then they were bound to show fault of the shipowner at the time of the origin of the fire. Claimants failed to do this.

4. The decision of the Circuit Court of Appeals in applying *The Vallescura* doctrine, made Borges' fault retroactive, with the result that the shipowner was deprived of its unconditional right to exoneration for damage which had been caused at sea by the officers in charge of the vessel, and for whose fault the shipowner was not responsible.

5. In applying *The Vallescura*, the Circuit Court of Appeals has lifted a concept of a rule of damages from another field in admiralty and infused it into the Fire Statute. In so doing, it placed upon the shipowner the impossible burden of distinguishing the damage at sea from that which occurred after arriving in port. It thereby abrogated a fundamental statutory precept when it deprived the shipowner of its unconditional right of exoneration.

6. The decision of the Circuit Court of Appeals imposed liability by applying a judicial rule of damage without the preliminary proofs that the fire was *"caused by the * * * neglect of such owner"* as required by the Fire Statute. It frustrates the purpose of the statute.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, New York, New York, April 23rd, 1947.

REPUBLIC OF THE UNITED STATES OF BRAZIL, trading under the name and style of LLOYD BRASILEIRO,
Petitioner.

By
FRANK J. MCCONNELL,
Proctor.

I HEREBY CERTIFY that I have examined the foregoing petition for a writ of certiorari and that, in my opinion, it is well founded and the cause is entitled to favorable consideration of the Court.

New York, New York, April 23rd, 1947.

FRANK J. MCCONNELL,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM 1946

No.

In the Matter of the Petition

of

The Republic of the United States of Brazil, trading under the name and style of Lloyd Brasileiro, as owner of the S.S. Pocone, for exoneration.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

The cargo fire was not "caused" by the neglect of Borges.

The cargo fire started at sea, while the ship was in charge of her master and crew, for whose acts this petitioner is not responsible. *The Galileo,* 54 Fed. (2d) 913, 287 U. S. 420.

The petitioner's port engineer at New York did not *cause* the cargo fire. The castor beans had been burning contemporaneously with the fire in the coal bunker which was discovered on December 19th, eleven days before the ship docked. All that was required to start a general conflagration was sufficient oxygen which was admitted in greater volume as the stevedores gradually discharged

cargo from the No. 3 'tween deck above the No. 3 reserve bunker. Regardless of what shore officials might have done about it the cargo fire was an accomplished fact before the vessel's arrival. Borges did not go on board the vessel until she docked. Hence, he could not have *caused* it. That he might have minimized its spread after the vessel arrived in port does not relieve the claimants of the initial burden imposed upon them by the Fire Statute of showing that the fire was *caused* by the neglect of the shipowner. Whether Borges could have done anything to minimize the spread of the fire is beside the point. He certainly had nothing to do with its *cause.*

The Circuit Court of Appeals stated:

> "• • • *Obviously it is impossible to know when the charring began; and it makes no difference.*"

But it *does* make a difference. With an unknown *cargo* fire in progress *before* the vessel docked, its "cause" obviously was not attributable to Borges, the shipowner's port engineer, but was due solely to the negligence of the master or the chief engineer of the vessel, *for whose acts, under the Fire Statute, the shipowner is not responsible.* The Circuit Court also held:

> "• • • *it is not important whether some of the damage had been done before Borges failed in his duty;* any more than whether such preceding damage may have been one of the causes for the fire in the stow. If the owner would free itself from liability for such damage the doctrine of *The Vallescura* (293 U. S. 296) imposes upon it the hard burden of proving how much was not caused by the wrong, a burden whose discharge ordinarily carries such small hope of success that it (Petitioner) may not care to make the attempt." (Our emphasis.)

But it is important. The retroactive application of *The Vallescura* doctrine in this case frustrates and subverts the very purpose of the Fire Statute because it relieves the claimants of their affirmative burden of proving

that the fire was caused by the fault of one of the shipowner's superintending agents, and places upon the shipowner a negative burden of proof. The shipowner is charged with all the damage though claimants have not shown that the neglect of the shipowner originated or caused the fire. The shipowner is thus deprived of its right to statutory exoneration when its steamer arrives in port with a cargo fire burning in her holds for which it is not responsible, and where, from the very nature of things, it will be impossible to separate fire damage caused before her arrival in port from that which follows.

In reaching its decision, the Circuit Court of Appeals erroneously applied the doctrine of *The Vallescura*, 293 U. S. 296. In that case the ship carried onions in bags from Valencia, Spain, to the port of New York. They arrived damaged due to lack of ventilation, which in part was necessitated by bad weather requiring the closing of hatches, and in part was due to negligent failure to open hatches at times when ventilation might have been obtained by that means. It was held, as a rule of law, that the carrier had the burden of distinguishing the damage which came within the exception of perils of the sea, from that due to negligent ventilation and, not having sustained that burden, it was held liable for the entire loss.

In the instant case, however, the Circuit Court of Appeals overlooked the effect of the Fire Statute when it retroactively applied *The Vallescura* rule of damages. *The Vallescura* rule of damages *follows and does not precede a finding of fault* as will be seen from the application of the rule of law in *The Niel Maersk*, 91 F. (2d) 932, C. C. A. 2nd C.; certiorari denied 302 U. S. 753, 82 L. Ed. 582. There, fish meal was discharged damaged. The Circuit Court of Appeals for the Second Circuit found there was no proof of the condition of the fish meal at the time it was received by the carrier and that, therefore, the carrier should not have the burden of separating damage arising from causes prior to shipment from damage due to negligent stowage.

Judge Learned Hand concurred with the opinion of Judge Augustus N. Hand (91 F. (2d) 935);

> "• • • We think that the rule of *Schnell* v. *The Vallescura* does not apply to such a situation. The libellants have not sustained the initial burden of proving the condition of the shipments when made so that they have not established a cause of action."

The District Court held that the only neglect shown was that of her master and the ship's officers (Rec. 1258, 1284), and that when Borges went on board, he was justified by what he found in believing the bunker fire was out (Rec. 1254). The Circuit Court of Appeals, however, erroneously *charged him with all that the master knew before the vessel arrived,* in addition to what happened after she docked. This, in effect, charged Borges with responsibility for the cargo fire *caused* at sea. Irrespective of how aggressively Borges might have taxed the master as to what he knew of the extent of the coal fire, or how far he bestirred himself delving into the engineroom logs, the plain fact is that the cargo fire started before Borges had anything to do with the vessel. Hence, Borges should not be held accountable for negligently causing a fire which obviously commenced days before he went aboard the ship.

POINT II

The Fire Statute is paramount. It should not be abrogated by *The Vallescura* doctrine.

The Fire Statute is one of the sections of the limited liability laws enacted in 1851 (46 U. S. C. 181-189). By their provisions, Congress expressed its intention to encourage maritime commerce. *Providence & New York Steamship Co.* v. *Hill Manufacturing Co.,* 109 U. S. 578, 27 L. Ed. 1038, was one of the early cases involving the Fire Statute. There, the Supreme Court, in discussing these laws, said (109 U. S. 588-589):

"* * * In these provisions of the Statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated, will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

This court has in the past construed these laws liberally. *Walker et al.* v. *Western Transportation Co.*, 70 U. S. (3 Wall.) 150; *Norwich & N. Y. Trans. Co.* v. *Wright*, 80 U. S. (13 Wall.) 104, 20 L. Ed. 585; *The Main* v. *Williams*, 152 U. S. 122, 38 L. Ed. 381; *Earl & Stoddardt* v. *Ellermans Wilson Line* (*The Galileo*), 287 U. S. 420, 77 L. Ed. 403; *Larsen* v. *Northland Transp. Co.*, 292 U. S. 20, 78 L. Ed. 1096; *Consumers Import Co., Inc., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo et al., The Venice Maru*, 320 U. S. 249, 88 L. Ed. 30.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 27 L. Ed. 1038, the Supreme Court said (109 U. S. 602):

"In all cases of loss by fire, not falling within the exception, the exemption from liability is total."

Earl & Stoddardt v. *Ellermans Wilson Line* (*The Galileo*), 287 U. S. 420, 77 L. Ed. 403. In that case cargo claimants contended that the shipowner was not entitled to exoneration because it had failed to make the ship sea-

worthy at the outset of the voyage. This Court said (287 U. S. 425):

> "The Fire Statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'. *The statute makes no other exception from the complete immunity granted.*" (Our emphasis.)

In *Consumers Import Co., Inc., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.* (*The Venice Maru*), 133 F. (2d) 781, C. C. A. 2nd C., Learned Hand, C. J., the Court held (p. 785):

> "We must not clutch at such straws to find liability or construe the Fire Statute grudgingly. Congress has in many other ways changed the law of shipping since it was passed but in the eternal conflict between hull and cargo, the hull has been able so far to hold this ground; * * *."

In that case, the cargo claimants contended in the Supreme Court that while the Fire Statute might grant exoneration to the shipowner, yet the ship herself was liable *in rem* for the maritime lien arising out of the cargo damage; but the Supreme Court held that the Fire Statute extinguished all liability and added (320 U. S. 249, at p. 254):

> "* * * claimant's contention would result in a frustration of the purpose of the act."

The burden of proving that the petitioner was guilty of neglect is, under the statute, cast upon those who allege it—the claimants. *The Cabo Hatteras,* 1933 American Maritime Cases 1587, at page 1594; *The Older,* 1933 American Maritime Cases 936, at page 937, 65 F. (2d) 359; *Hoskyn & Co. Inc., et al.* v. *Silver Line Limited* (*The Silvercypress*), 1943 American Maritime Cases 224, 143 F. (2d) 462, cert. denied 323 U. S. 767.

Here, in the case at bar, the Circuit Court of Appeals has done something revolutionary and without precedent. By imposing upon the shipowner rather than the cargo claimants the impossible burden of *The Vallescura* damage rule, it has deprived the shipowner of its unconditional right of exoneration for fire damage which originated without the fault of the shipowner.

The language of the Fire Statute is clear. It *unconditionally* exempts the shipowner where the *cause* of the fire cannot be attributed to the shipowner's own negligence. *Hoskyn & Co. Inc., et al.* v. *Silver Line Limited* (*The Silvercypress*), *supra.* If *The Vallescura* rule is permitted to supersede the Fire Statute, as it has now been applied by the Circuit Court of Appeals, the door is opened to a return to the harsh aspects of the ocean carrier's liability before the Fire Statute was passed in 1851, and the object of the Statute will be defeated whenever a vessel reaches her destination with a cargo fire *caused* without fault on the owner's part, as a result of the negligence of the master and crew, and the owner's shore agent fails to prevent the fire from spreading.

In the instant case, the claimants *have not* sustained their initial burden under the Fire Statute of proving that the cargo fire, *originating at sea,* was caused by the petitioner's neglect. We think Judge Learned Hand overlooked the fact that *The Vallescura* doctrine is a *rule of damage* which should not have been applied. Until the cargo claimants affirmatively show that the fire was *"caused by the • • • neglect of such owner"* they have not sustained their initial burden of proof.

POINT III

The other issues not passed upon by the Circuit Court of Appeals.

The seaworthiness of the *Pocone's* bulkheads and general average, the subjects of the cross-appeal by the petitioner, were not passed upon by the Circuit Court of Appeals. The Circuit Court said (Rec. 1322):

> " • • • the first and chief issue is of the owner's liability under the fire statute: that is to say, whether the fire was 'caused by its design or neglect.' A second and subsidiary issue is of the owner's liability for the water damage, but, as will appear, this it will be unnecessary to decide. • • • "

In concluding, the Court said (Rec. 1329):

> " • • • and we need not go into the question of the seaworthiness of the *Pocone's* bulkheads."

However, the Supreme Court has the power to try an admiralty case coming before it *de novo*. *Langnes* v. *Green* (*The Aloha*), 1931 A. M. C. 511, 282 U. S. 531, 75 L. Ed. 520, 51 Sup. Ct. Rep. 243. There, the Supreme Court (282 U. S. 536) said:

> " 'What is the scope of inquiry in this court when the case is brought up by certiorari from the circuit court of appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, but "must enter the judgment, which should have been rendered by the court below on the record then before it." ' • • • "

See also *Southern Pacific Co.* v. *Haglund, Admx.* (*The Thoroughfare*), 1928 A. M. C. 965, 277 U. S. 304, 72 L. Ed. 892, 48 Sup. Ct. Rep. 510.

CONCLUSION

A writ of certiorari should be granted to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.

Dated, New York, April 23rd, 1947.

Respectfully submitted,

FRANK J. MCCONNELL,
Proctor for Petitioner,
The Republic of the
United States of Brazil.

FRANK J. MCCONNELL,
JAMES D. BROWN,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1302.

In the Matter

—of the—

Petition of United States of Brazil, doing business under the trade name and style of LLOYD BRASILEIRO, for exoneration from or limitation of liability as owner of the S. S. "POCONE".

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The main argument advanced by the petitioner for the granting of a writ has, we submit, no relation to the facts of this case. It is repeatedly stated in the petition and supporting brief (pp. 3, 5, 9, 10, 11 and 12) that fire broke out in the cargo while the "Pocone" was at sea; and that after the vessel tied up at her pier in Brooklyn, the existing fire in the cargo continued.

There is no justification for these assertions. Both the District Court (Finding 34, R. 1284) and the Circuit Court of Appeals (R. 1324) found that fire first broke out in the cargo at about 7:30 a.m. on January 1, 1942. The vessel had tied up at her pier in Brooklyn two days before (Finding 16, R. 1280).

Both of the courts below found that the outbreak of fire in the cargo was due to the negligence of those responsible for the discharge of the vessel, in fail-

ing promptly to remove the inflammable cargo stowed in the compartment adjoining the bunker where the coal had been on fire and separated from the fire only by a 3/8" steel bulkhead (R. 1283-4, 1328). The petitioner completely ignores these concurrent findings.

Apart from its attempt to reargue the facts, the only question presented by the petitioner is whether a carrier, through whose personal negligence fire has broken out in cargo, may escape liability for the resulting heavy loss in the vessel's various compartments, because of the fact that prior to its personal negligence and prior to the outbreak of the fire there was some heating and charring of the cargo immediately adjacent to the source of the fire. The petitioner's argument is that as the damage due solely to this heating and charring cannot be accurately determined, it should escape liability altogether. We believe that the mere statement of this proposition carries its own answer.

The petitioner asserts that the principle laid down by this court in *"The Vallescura"*, 293 U. S. 296, does not apply to the present case. We cannot understand why it does not apply, and neither could the Circuit Court of Appeals (R. 1329).

Respectfully submitted,

HENRY N. LONGLEY,
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Proctors for Respondents.